

No. 12,376

IN THE

United States Court of Appeals
For the Ninth Circuit

CITY AND COUNTY OF HONOLULU,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S SUPPLEMENTAL BRIEF.

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APPELLANT'S SUPPLEMENTAL BRIEF.

Pursuant to Order of this Honorable Court entered in these proceedings on May 11, 1950, directing both Appellee and Appellant to submit supplemental briefs on the general question of jurisdiction of the subject matter and the specific question of whether eminent domain was the correct procedure employed for the acquisition of subject streets, Appellant submits the following:

I.

Up to the time of annexation, the Republic of Hawaii functioned as a duly constituted and sovereign government and as stated by Mr. Justice Brown in *Hawaii v. Mankichi*, 190 U.S. 197, at pp. 211 and 212 wherein a full recital of the events leading up to annexation is set forth,

“In fixing upon the proper construction to be given to this resolution, (Newlands Resolution *infra* p. —) it is important to bear in mind the history and condition of the islands prior to their annexation by Congress. Since 1847 they had enjoyed the blessings of a civilized government, and a system of jurisprudence modeled largely upon the common law of England and the United States. Though lying in the tropical zone, the salubrity of their climate and the fertility of their soil had attracted thither large numbers of people from Europe and America, who brought with them political ideas and traditions which, about sixty years ago, found expression in the adoption of a code of laws appropriate to their new conditions. Churches were founded, schools opened, courts of justice established, and civil and criminal laws administered upon substantially the same principles which prevailed in the two countries from which most of the immigrants had come. * * *, when the Hawaiian flag was hauled down and the American flag hoisted in its place.”

II.

The terms of the Republic of Hawaii's consent to annexation and the acceptance of that consent by the United States Congress by Joint Resolution wherein the cession of the Hawaiian Islands to the United States was accepted, ratified and confirmed, constituted a compact by and between two sovereigns.

Said consent by the Republic of Hawaii reads in part as follows:

“BE IT RESOLVED, by the Senate of the Republic of Hawaii:

That the Senate hereby ratifies and advises and consents to the ratification by the President of the treaty between the Republic of Hawaii and the United States of America on the subject of the annexation of the Hawaiian Islands to the United States of America concluded at Washington on the 16th day of June, A. D. 1897, which treaty is word for word as follows:

‘The Republic of Hawaii and the United States of America, in view of the natural dependence of the Hawaiian Islands upon the United States, of their geographical proximity thereto, of the preponderant share acquired by the United States and its citizens in the industries and trade of said Islands, and of the expressed desire of the government of the Republic of Hawaii that those Islands should be incorporated into the United States as an integral part thereof, and under its sovereignty, have determined to accomplish by treaty an object so important to their mutual and permanent welfare.

* * * * *

‘ARTICLE II. The Republic of Hawaii also cedes and hereby transfers to the United States the absolute fee and ownership of all public, government or crown lands, public buildings or edifices, ports, harbors, military equipments, and all other public property of every kind and description belonging to the government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining.

‘The existing laws of the United States relative to public lands shall not apply to such lands

in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition. Provided: that all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.' ”

(*Sen. Jrnl. Rep. of Ha. Ex. Sess. 1897*, p. 16.)

The Joint Resolution of Congress No. 55, dated July 7, 1898, accepting, ratifying and confirming the cession and annexation of the Hawaiian Islands, commonly known as the Newlands Resolution, reads in part as follows:

“Whereas the Government of the Republic of Hawaii, having in due form, signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining; Therefore

RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That said *cession is accepted, ratified, and confirmed*, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America. (*Italics ours*)

The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition; *Provided*, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."

30 Stat. at L. 750

III.

The United States Congress in establishing the Territory of Hawaii, created more than a mere department of government or district comparable to the District of Columbia; the United States Congress so organized the territorial government as to possess the powers of a sovereign government. (*David Kawa-*

nanakoa et al. v. Aileen Albertina Polyblank, 205 U.S. 349).

The government of the Territory of Hawaii was constituted in tripartite form with its capital at Honolulu, on the island of Oahu (48 U.S.C.A. 491-636) and the Organic Act provided among other things,

“Sec. 5. U.S. Constitution. That the constitution and except as otherwise provided, all laws of the United States, including laws carrying general appropriations which are not locally inapplicable shall have the same force and effect within the said territory as elsewhere in the United States * * *”

48 U.S.C.A. 495

IV.

As to the land that was owned by the Republic of Hawaii and ceded to the United States upon annexation, the United States, under the terms of the cession made by the Republic of Hawaii and the Newlands resolution accepting the cession:

(1) Reserved unto the United States the right for Federal departments to have free use of the ceded lands;

(2) Recognized the inhabitants of the Territory of Hawaii as being the substantial owners of the land so ceded; and

(3) Continued in effect the Hawaiian land laws in lieu of the public land laws of the United States.

Quoting again from the Joint Resolution to provide for annexing the Hawaiian Islands to the United States,

“The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition; Provided, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.”

The United States Congress integrated this provision in the Organic Act for the Territory of Hawaii. Section 91 thereof provides:

“Sec. 91. That, except as otherwise provided, the public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July seventh, eighteen hundred and ninety-eight, shall be and remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the *President* or of the Governor of Hawaii. And any such public property so taken for the uses and purposes of the United States may be restored to

its previous status by direction of the President; and the title to any such public property in the possession and use of the Territory for the purposes of water, sewer, electric, and other public works, penal, charitable, scientific, and educational institutions, cemeteries, hospitals, parks, highways, wharves, landings, harbor improvements, public buildings, or other public purposes, or required, for any such purposes, may be transferred to the Territory by direction of the President, and the title to any property so transferred to the Territory may thereafter be transferred to any city, county or other political subdivision thereof by direction of the governor when thereunto authorized by the legislature; Provided, That when any such public property so taken for the uses and purposes of the United States, if instead of being used for public purpose, is thereafter by the United States leased, rented, or granted upon revocable permits to private parties, the rentals or consideration shall be covered into the treasury of the Territory of Hawaii for the use and benefit of the purposes named in this section.” (Italics ours.)

48 U.S.C.A. 511

By said Section 91, pursuant to the terms of the cession, the President of the United States may authorize federal use of the ceded lands. It was because the land in the *Chun Chin* case, *United States v. Chun Chin*, 150 F. 2d 1016 (1945), was ceded land, and subject to Section 91, that it was the judgment of this Honorable Court that such land

should not have been condemned. That such reserved right of federal use does not exist as to the land acquired since annexation and owned outright by the Territory and its political subdivisions appears from Points VI through VIII of this brief.

While the important question is the one just indicated, that is, the distinction between the ceded land and the land owned by the Territory and its political subdivisions, nevertheless, the extent of the Territory's powers over and rights in the ceded land has bearing on the question of its independent enjoyment of the land owned outright by the Territory and its political subdivisions, that is, land acquired since the date of the cession. Pursuant to the terms of the cession the Hawaiian Organic Act recognized the Territory of Hawaii as the substantial owner of the ceded land. The Territory was vested with wide powers, including the power of disposition of the ceded land under the Hawaiian land laws continued in effect by section 73(c) of the Hawaiian Organic Act (48 U.S.C. 664, reviewed in *Pratt v. Holloway*, 17 Haw. 539), and the expenditure of the proceeds pursuant to Section 73(e) of the Hawaiian Organic Act (48 U.S.C. 666). That the Territory remained the substantial owner of the ceded land was held by this Court in *United States v. Fullard-Leo*, 156 F. 2d 756, 759-760, affirmed on other grounds, 331 U.S. 256.

The rights of the Territory in the ceded lands are such that even when they are in federal use, pur-

suant to the reserved right to make such use of the ceded lands, any revenue derived from rents or the like "shall be covered into the treasury of the Territory of Hawaii" (Sec. 91, Organic Act, 48 U.S.C. 511). When federal use of a parcel of ceded land is terminated, the control of the land is returned to the Territory, pursuant to Section 91 above quoted.

V.

Congress having vested in the territorial government the wide powers above set forth, a specific reservation of the right of federal use of Hawaii lands is a necessity. Otherwise such right of federal use does not exist. This was the ruling of the Attorney General of the United States in the case of Porto Rico. In 1901, the Navy Department requested the President by executive order, to set aside certain lands in Porto Rico for the use of the Navy Department as an advanced naval base. The United States Attorney General rendered an opinion on said question which opinion reads in part as follows:

"* * * But I am unable to escape from the conclusion that when harbor margins are involved, the Government of the United States, by reason of these grants of Congress to the government of Porto Rico, is now in the same position with reference to the island government, as well as to private owners, as it would be in a similar case affecting a State of the United States. In such case the Constitution indicates the proper course to be taken, to which the practice of the Government has conformed,

by providing that Congress may 'exercise exclusive legislation * * * over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings' (Art. I, sec. 8, cl. 17). It is not needful in this case to withhold the analogy because the word 'State' alone is used in this provision, for Congress appears clearly to have placed the Territory of Porto Rico on the same plane as a State, in this respect at least, by its surrender of a large share of public property and functions to the local control."

23 OPS Atty. Gen. 564, 566 construing the Porto Rico Act of April 12, 1900, 31 *Stat.* 77.

VI.

That the Territory and its political subdivisions themselves may hold the title to land is recognized by the above quoted Section 91 of the Organic Act. This section provides a method whereby even the title of land ceded to the United States may be vested in the Territory or its political subdivisions. The patent purpose of such provision is to enable the Territory of Hawaii and its political subdivisions to proceed with public works and other governmental functions under a secure title which will not be subject to the possibility of the Federal Government taking over the property under the original reserved power of federal use. For this purpose Section 91 provides that the title to property required for public works of the Territory or other

public purposes may be transferred to the Territory by direction of the President. For an example of such a presidential proclamation we refer the Court to the proclamation of February 17, 1920, 41 Stat. 1786 (Part 2), printed in the Appendix of this brief.

VII.

The fee of the streets in the subject case never was ceded to the United States, but was acquired by the Territory of Hawaii and the City and County of Honolulu by grant from the Oahu Railway and Land Company subsequent to date of cession (R. 97-102).

VIII.

In keeping with its purpose and intent that the Territory of Hawaii and its political subdivisions could own land in their own title, and even obtain a retransfer of ceded titles which would place ceded land beyond the power of the President to authorize federal use thereof, the United States Congress has never authorized the President to take or allocate for federal use land owned by the Territory of Hawaii or its political subdivisions. As above noted, the public land laws of the United States do not apply.

By the Act of August 21, 1941 (55 Stat. 394; 48 U.S.C.A. 677) Congress inserted a provision in Section 73(q) of the Organic Act that the Governor of Hawaii could set land aside for federal use. This section, 73(q), is not restricted to ceded

land in that it embraces all public land owned by the Territory, and it is important to note that in amending this section, Congress gave sole power and authority to the Governor of the Territory of Hawaii; it gave no power to the President such as is given to the President in Section 91, supra, relating to ceded land. This means that a federal department, having need of land owned by the Territory, may apply only to a territorial officer, the Governor of Hawaii, for its use. If the Governor of Hawaii does authorize federal use of territorial land, under Section 73(q) of the Organic Act, above cited, the Governor likewise can withdraw the land from such use. Again there is a contrast with Section 91 above quoted (48 U.S.C. 511) which governs the ceded land; under Section 91 once land is taken for federal use it remains in such use until the President restores it.

As a result, a federal department has only the power of eminent domain by which to acquire the fee title of territorial land. Hence, it must be presumed that Congress intended that power of eminent domain be used.

CONCLUSION.

It is submitted, that for the foregoing reasons this Honorable Court does have jurisdiction of the subject matter herein and further, that proceedings in eminent domain were properly instituted for the

purpose of acquiring the fee and improvements of
subject streets.

Dated, Honolulu, Hawaii,
July 10, 1950.

Respectfully submitted,

THE CITY AND COUNTY OF HONOLULU,
Appellant,

By WILFORD D. GODBOLD,

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(Appendix Follows.)

Appendix

41 U.S. Stats. p. 1786 (Pt. 2)

By the President of the United States of America

A PROCLAMATION

WHEREAS section ninety-one of the Act of Congress approved April thirtieth, nineteen hundred, entitled “An Act to provide a government for the Territory of Hawaii” (31 Stat., 141-159) as amended by Section seven of the Act approved May twenty-seventh, nineteen hundred and ten (36 Stat., 443, 447) authorizing the transfer of the title to certain public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July seventh, eighteen hundred and ninety-eight (30 Stat., 750), and in the possession and use of the Territory of Hawaii, to said Territory; and

WHEREAS it is necessary that the title to such public property be transferred to the Territory of Hawaii;

Now, therefore, I Woodrow Wilson, President of the United States of America, by virtue of the power vested in me by section seven of the Act of Congress approved May twenty-seventh, nineteen hundred and ten (36 Stat., 443, 447), do hereby transfer to the Territory of Hawaii the title to all such pub-

lic property so ceded by the Republic of Hawaii and in the possession and use of said Territory for the purposes of water, sewer, electric, and other public works, penal, charitable, scientific, and educational institutions, cemeteries, hospitals, parks, highways, wharves, landings, harbor improvements, public buildings, or other public purposes, or required for any such purposes:

Provided, That this proclamation shall not affect the title to any such public property within the said Territory taken for the uses and purposes of the United States, unless such property has been or shall be restored to its previous status by direction of the President of the United States in accordance with said section seven of the Act approved May twenty-seventh, nineteen hundred and ten.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done in the District of Columbia this 17th day of February, in the year of our Lord one thousand nine hundred twenty and the Independence of the United States the one hundred and forty-fourth.

(Seal)

Woodrow Wilson

By the President:

Frank L. Polk

Acting Secretary of State

